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RESIDENTS OF PRESCOTT VALLEY,
TRACY AND TROY DENTON, ET. AL.,

Complainants,

vs.

QWEST CORPORATION,

Respondent.

Docket No. T-01051B-02-0535

**QWEST CORPORATION'S POST-
HEARING BRIEF.**

Qwest Corporation ("Qwest") hereby submits its post-hearing brief regarding its authority and obligation to provide service to individuals outside of its designated service territory. In July 2002, residents of the Poquito Valley area near Prescott Valley, Arizona, filed complaints against Qwest requesting telephone service to their homes. Originally, nine complaints were filed. Of those complaints, only three remain.¹

The sole stated basis for these complaints is that Qwest discriminated against the Complainants pursuant to A.R.S § 40-344. The Complainants assert that Qwest's inadvertent provision of service to two properties within Section 11 forms the basis of this discrimination. The Complainants have no other basis for their claims. To the contrary,

¹ At hearing, the hearing officer dismissed five complaints with prejudice (Susan Bernstein, Kirk and Bobbi Limburg, Arnold and Tamara Fatheree, April and Bryant Peters, and John and Patricia Martin). The primary reason for their dismissal was lack of participation in these proceedings, including failure to appear at hearing. The complaint filed by Sandra Rodr, was dismissed without prejudice since she sent written notification to the Commission stating that she no longer wanted to be involved with the complaint against Qwest.

1 all of the Complainants testified that they had previously been customers of Qwest and
2 had no problem with the company or the service it provided. TR² 43 (S. Thompson); 102
3 (E. Thompson); 175 (T. White); 186 (Troy Denton).

4 In Arizona, a utility has an obligation to serve individuals within its service area.
5 This obligation requires the utility to provide reasonable, adequate and non-discriminatory
6 service to customers seeking service in that service territory. Concomitantly, a utility
7 does not have a right or obligation to serve individuals outside of its defined service
8 territory. *See, e.g., James Paul Water Company v. Arizona Corporation Commission*, 137
9 Ariz. 426, 671 P.2d 404 (1983).

10 One exception to this general rule is when a utility provides service to property that
11 is "contiguous" to its service boundaries. *See* A.R.S. § 40-281. As defined by Staff in this
12 docket, contiguous means adjacent to or touching the utilities boundary line.³ TR 523.
13 Thus, as Staff testified at hearing, extending service to one or two contiguous properties
14 does not mean that the utility must extend beyond those properties and assume the legally
15 imposed obligations it has to customers in its service area boundaries.

16 The other exception to the general rule is that although a utility is not obligated or
17 authorized to provide service to individuals outside of its service boundaries to non-
18 contiguous properties, the law requires it to do so in a non-discriminatory manner if the
19 utility willingly and intentionally extends its service to noncontiguous areas. *See, e.g.,*
20 *Tonto Creek Estates Homeowners Ass'n v. Arizona Corp. Comm'n*, 177 Ariz. 49, 864
21 P.2d 1081 (App. 1993). In those instances where the utility has demonstrated its intent to
22 provide service, it must provide the service in the same non-discriminatory manner as it
23 does to other areas in its territory. Absent contiguity or discrimination, a utility has no

24
25 ² "TR" refers to the transcript of the July 14-15, 2003 hearing in this matter.

26 ³ Under Staff's definition, if a utility wanted to serve a parcel of property that bordered its defined service territory, it could do so. That extension, however, would not include additional parcels that bordered the contiguous parcel. In other words, the utility's boundary line remains the same. TR 523-25 (Staff).

1 authority or obligation to provide service outside its service area.

2 In this case, Qwest provided service to two addresses that are contiguous to its
3 service boundaries, a right provided to it by Arizona laws. Although authorized to do so,
4 Qwest did not, however, provide that service intentionally or "pick and choose" whom it
5 wanted to serve. Rather, Qwest mistakenly took service orders for two addresses that
6 were outside of its service boundary. This inadvertent provision of service does not create
7 a duty to provide service to the entire area including noncontiguous properties. Without
8 intent, there can be no discrimination, particularly when the company was authorized to
9 provide service where it did. This is even clearer when, as here, the Commission
10 specifically instructed Qwest NOT to disconnect these two services after Qwest
11 discovered the error and notified the Commission. TR 362-63 (Duffy). There is absolutely
12 no evidence whatsoever that Qwest discriminated against the Complainants in refusing
13 them service. To the contrary, all of evidence presented in this hearing shows that Qwest
14 consistently and uniformly refused service to the Complainants and other persons who are
15 not in Qwest's service territory.

16 Since the onset of telephone competition, federal and state mandates have pressed
17 Qwest to open its facilities and services to competition while maintaining a high level of
18 service quality to all its existing customers. As a result, Qwest must constantly maintain
19 the precarious balance between market forces that are supposed to drive competition and
20 continued regulation over Qwest as an incumbent local exchange carrier ("ILEC"), such
21 as the Service Quality Plan Tariff. Ultimately, any company faces a series of limitations
22 on what it can do, and those limitations are matters of capital and resources. There simply
23 are limits to what can be done.

24 Just as the Complainants would like to be served by the telephone company of their
25 choice, there undoubtedly are people in other parts of Arizona, many located miles from
26 any existing telephone facilities and service, who would like to be served by carriers they

1 select. Underserved and unserved areas present important policy issues that should be
2 addressed by the Commission on an industry-wide, state-wide basis and not piecemeal,
3 two or three properties at a time.

4 Here, the Complainants and others in the Poquito Valley area have wireless service
5 and have an opportunity to obtain wireline service through Midvale Telephone Exchange,
6 Inc. ("Midvale") – an Incumbent Local Exchange Carrier ("ILEC") that has offered and
7 applied to provide it. The standard that the Commission must apply in determining
8 whether to issue a new certificate is whether the application for service is in the public
9 interest. Here, the cost would be lower for the Complainants and future customers within
10 Qwest's service territory to grant Midvale's application to serve Section 11.

11 **I. QWEST'S OBLIGATIONS TO SERVE WITHIN ITS SERVICE**
12 **TERRITORY TO NOT EXTEND TO THE COMPLAINANTS.**

13 Arizona has no Constitutional provision or statute that grants the Commission
14 power to order the extension of a certificate of convenience and necessity (or "CC&N"),
15 *sua sponte*, where a public service corporation has not manifested an intent or willingness
16 to serve or file an application and, in fact, opposes the extension.⁴ Complainants attempt
17 to show that Qwest violated a "provision of law or any order or rule of the
18 commission..." as a basis for seeking a Commission order requiring Qwest to extend
19 service. A.R.S. § 40-246(A).⁵ The Complainants claim only that Qwest violated A.R.S.

20 ⁴ The Commission has consistently treated Qwest's grandfathered operating rights as the equivalent of CC&N's. For
21 example, it has required Qwest to follow the same procedures when transferring those rights as when certificates are
22 transferred. *See, e.g., In re Application of Mountain States Tel. & Tel. Co.*, Docket No. 9981-E-1051 & U-2063,
Decision No. 47161 (July 30, 1976). In this proceeding, Staff referred to A.A.C R14-2-502 (Certificates of
Convenience and Necessity for telephone utilities; additions/extensions; abandonments) to explain Qwest's rights and
obligations with respect to extending its service territory. *See* TR 522 (Staff).

23 The Commission does not have plenary power to regulate public service corporations relative to their
24 certificates of convenience and necessity. *Williams v. Pipe Trade Indus. Program of Ariz.*, 100 Ariz. 14, 19, 409 P.2d
720, 723 (1966); *Corp. Comm'n v. Pacific Greyhound Lines*, 54 Ariz. 159, 176-77, 94 P.2d 443, 450 (1939). With
25 the exception of rate making authority, the Commission's powers are limited and do not exceed those to be derived
26 from a strict construction of the Constitution and implementing statutes. *Williams*, 100 Ariz. at 17, 409 P.2d at 722;
Walker v. DeConcini, 86 Ariz. 143, 150, 341 P.2d 933, 938 (1959).

⁵ It should be noted that A.R.S. § 40-344 by its own terms, and as interpreted by the courts, applies to customers of
the utility. It has not been construed to apply to non-customers, such as the Complainants. *See Miller v. Salt River*

1 § 40-344 prohibiting a public service corporation from discriminating in its provision of
2 service. TR 24-25 (S. Thompson).

3 A.R.S. § 40-282 creates a process whereby a public service corporation applies for
4 a certificate, or an extension thereof, when it wants to provide service to a particular area.
5 (The corresponding rule for telecommunication carriers, A.A.C. R14-2-502, is consistent
6 with the statute.) The boundaries of its CC&N's or service territory define a utility's
7 obligation and authority to serve. That is what service territory and these complaints are
8 about.

9 In this case, Qwest has undertaken to serve a particular territory, and the
10 Commission regulates Qwest to make certain that the service is reasonable, adequate and
11 non-discriminatory. The Complainants are not part of that territory, and Qwest has never
12 manifested any intent to serve them. To the contrary, it has consistently and repeatedly
13 denied service to these individuals, as it has in all similar cases in the past, because they
14 are outside of Qwest's service area.

15 **A. Qwest's Obligations in Providing Service Do Not Include an Obligation**
16 **to Serve or Extend Service Outside of its Declared Service Boundaries.**

17 In Arizona, public service corporations must assume certain obligations to the
18 public. *See Application of Trico Electric Cooperative, Inc.*, 92 Ariz. 373, 377 P.2d 309
19 (1963). *See also, James Paul Water Company v. Arizona Corporation Commission*, 137
20 Ariz. 426, 671 P.2d 404 (1983). One of these obligations is that a public service
21 corporation must provide adequate service to all qualified customers *within* the scope of
22 its service area. *See James Paul Water Co.*, 137 Ariz. at 429-430. *See also Application of*
23 *Trico*, 92 Ariz. at 385. This obligations, in turn, gives the Commission authority to order
24 a public service corporation to extend service to specific individuals or install additional

25 *Valley Water Users' Assoc.*, 11 Ariz. App. 256, 260, 463 P.2d 840, 844 (1970) (citing *Town of Wickenburg v. Sabin*,
26 68 Ariz. 75, 200 P.2d 342 (1948)). However, for the sake of argument and since no discrimination exists, Qwest
assumes that the principles constituting the non-discrimination doctrine apply in this case.

1 facilities (see A.R.S. § 40-331) but only *within* the company's certificated area. *Arizona*
2 *Corp. Commission v. Tucson Gas, Elec. Light & Power Co.*, 67 Ariz. 12, 189 P.2d 907
3 (1948); *Arizona Water Co. v. Arizona Corp. Comm'n.*, 161 Ariz. 389, 778 P.2d 1285
4 (App. 1989). A public service corporation is only subject to the orders of the Commission
5 to make such extensions, improvements and betterments as may be required to render
6 adequate service *to the communities it serves*. Ariz. Const. art. 15, § 3 and A.R.S. § 40-
7 331. See *Arizona Corp. Comm'n v. Tucson Gas, Electric Light & P. Co.*, 67 Ariz. 12, 189
8 P.2d 907 (1948).

9 The Commission may require a public service corporation, through enforcement
10 proceedings, to obtain a certificate for an area it in fact serves. See A.R.S. § 40-241 *et*
11 *seq.* However, the Commission's authority to act is based upon the requirement that a
12 public service corporation must have a certificate to "begin construction of a street,
13 railroad, a line, plant, service or system, or any extension thereof." A.R.S. § 40-281. In
14 other words, the Commission only has jurisdiction to compel certification or enjoin
15 service where a company, through its own willful actions or manifestations of intent, is
16 already serving the public in an area without authorization by way of a certificate of
17 convenience and necessity. See *Tonto Creek Estates Homeowners Ass'n v. Arizona Corp.*
18 *Comm'n*, 177 Ariz. 49, 864 P.2d 1081 (App. 1993); *Tucson Rapid Transit Co. v. Old*
19 *Pueblo Transit Co.*, 79 Ariz. 327, 289 P.2d 406 (1955); *Tucson Gas, Elec. Light & Power*
20 *v. Trico Elec. Co-op., Inc.*, 2 Ariz. App. 105, 406 P.2d 740 (App. 1965).

21 Boundary extensions may also be voluntary when service is provided to properties
22 "contiguous" to the utility's boundaries. See A.A.C. R14-2-502(B). In this proceeding,
23 Staff's definition of "contiguous" means adjacent to or abutting the utility's service
24 boundary. TR 522 (Testimony of Staff). In either instance, the extension is a voluntary
25 one implicating the same obligations and restrictions imposed within the utility's declared
26 service boundary, including the provision of non-discriminatory service. See A.R.S. § 40-

1 344. Such an extension, however, does not create an obligation to open service to an
2 entirely new Section. TR 524 (Staff).

3 Therefore, the only conceivable manner in which this Commission may require
4 Qwest to open service to the Complainants and Section 11 would be to show that Qwest
5 discriminated against the Complainants in some manner. In this case, there are no
6 circumstances under which the above obligations would require Qwest to provide service
7 to the Complainants or Section 11.

8 **B. Qwest has Never Manifested any Intent to Serve Section 11 or the**
9 **Complainants.**

10 The Commission may enforce obligations to provide service under a utility's
11 certificate or the equivalent service when the utility has manifested intent to provide
12 service to a particular area. Under *James P. Paul*, the Commission has authority to delete
13 portions of a carrier's certificate only if it can be shown that the carrier is unwilling or
14 unable to provide the necessary services. *James P. Paul*, 137 Ariz. at 431, 671 P.2d at
15 409. It follows that for the Commission to expand a carrier's certificated area, it must be
16 shown that the carrier was *willing* to provide the necessary services. Qwest is not that
17 carrier; Midvale is.

18 In *Tonto Creek*, the Commission ordered the current operator of a water system to
19 assume a certificate of convenience and necessity which had been issued to other persons,
20 and thus, furnish service to an area that lay outside the boundaries of its original
21 certificate.⁶ The Court upheld the Commission's order because it was supported by
22 evidence that the company was already providing water service to many lots in the
23 transferred area (i.e., it had evidenced an intent to serve the public with that area, as
24 opposed to providing service as a result of an inadvertent error). *Id.* at 53-54, 864 P.2d at

25 ⁶ *Tonto Creek* is the only case located where the Commission extended a public service corporation's certificated
26 service area absent the company's application despite its objection. This is consistent with Staff's testimony at
hearing that Staff's witness, Del Smith, has not seen a carrier forced to change its territory boundaries against its
will. TR 538 (Staff).

1 1085-86.

2 Specifically, the water provider in *Tonto Creek* was making individualized
3 determinations as to whether to furnish water to persons outside of its certificated area
4 each time an individual resident requested water service. *Id.* at 54, 864 P.2d at 1086.
5 “The [provider] prepared a form letter as a response to people outside of the certificated
6 area who might request service. The letter told them that *if the [provider] decided to*
7 *furnish water, it would be under the conditions of interior domestic use only, and*
8 *terminable by the [provider] at any time.” Id.* (emphasis added). Unlike Qwest in the
9 present case, the water provider never denied that it was the proper provider of water
10 services to the area, it argued only that it did not have to provide service to every person
11 that applied for it. *Id.* Moreover, the provider’s refusal to provide service was not based
12 upon a policy restricting its service area. Rather, it was because the potential new
13 customer would not agree to discriminatory charges.

14 Qwest has never agreed or applied to provide service to the area in dispute. In this
15 case, the Complainants testified at hearing that Qwest consistently refused to provide
16 service to them each and every time they tried to place an order. The reason for Qwest
17 refusing this service was the same each time: The Complainants were outside of Qwest’s
18 service territory. *See, e.g.,* TR 75:23-76:1; 91:24-92:2; 168:13-16; 214:9-215:3; 221:4-7.
19 As will be explained more fully below, Qwest inadvertently provided service to two
20 addresses within Section 11, which was discovered at the onset of these complaints. TR
21 348; 362 (Duffy). After this discovery, Qwest informed the Commission of its error and
22 was told not to disconnect service to these addresses. TR 363 (Duffy). Not only did
23 Qwest make clear that it had no intention of extending its service to the two addresses in
24 Section 11, but was instructed to continue service regardless. For the Commission to now
25 force Qwest to extend service to the entire Section against its will would be unjust and is
26 contrary to law.

1 **C. Carrier Of Last Resort Obligations Should Be Imposed On All Carriers**
2 **For The Areas In Which They Are Certified To Provide Service.**

3 If inherent in being a public service corporation is the obligation to provide service
4 to all qualified customers within their certified area, then *all* public service corporations
5 are subject to this requirement. Section 11 is not within Qwest's service boundaries.
6 Therefore, the Commission cannot impose such obligations by forcing Qwest to serve that
7 Section.

8 Currently, there are several active telecommunication carriers, none of which is
9 Qwest, certified to provide telecommunication services *statewide*. See Ex. R-9. Either a
10 public service corporation takes all steps necessary to provide service (i.e. becomes a
11 carrier of last resort) or it loses its certificate. See *James Paul Water Co.*, 137 Ariz. at 430.
12 ("Where a public service corporation holds a certificate for a given area, the public
13 interest requires that that corporation be allowed to retain its certificate until it is unable or
14 unwilling to provide needed service at a reasonable rate"). By failing to require these
15 statewide carriers to serve as carriers of last resort and serve all qualified customers, the
16 Commission would improperly allow them to avoid the obligations imposed by law on *all*
17 public service corporations.⁷

18 **D. The Complainants Already Have Adequate Telephone Service.**

19 Assuming for the sake of argument only that the Commission has authority to
20 require a carrier to provide service to open territory, its authority must of necessity be
21 limited to portions of open territory that are not adequately served and which no carrier
22 has expressed a desire to serve.

23 ⁷ To ignore these principles and require Qwest to serve as a carrier of last resort *outside* of certificated service area
24 would violate A.R.S. § 40-281 *et seq.* and the equal protection clauses of both the United States and Arizona
25 Constitutions. See *Plyler v. Doe*, 457 U.S. 202, 216, 102 S. Ct. 2382, 2394 (1982); *City of Cleburne v. Cleburne*
26 *Living Center, Inc.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 3254 (1985); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S.
869, 105 S. Ct. 1676 (1985); *Frost v. Corporation Comm'n of Oklahoma*, 278 U.S. 515, 49 S. Ct. 235 (1929); *State v.*
Beckerman, 168 Ariz. 451, 453, 814 P.2d 1388, 1390 (App. 1991); *Caldwell v. Pima Co.*, 172 Ariz. 352, 355, 837
P.2d 154, 157 (App. 1991); *Kenyon v. Hammer*, 142 Ariz. 69, 78, 688 P.2d 961, 970 (1984).

1 Several wireless providers serve the Prescott Valley area, and all Complainants
2 currently have wireless service. TR 120 (Alltel, Thompson); 173 (Wireless Internet,
3 White); 203 (Sprint, Dentons). One wireless provider, ALLTEL Communications, Inc.
4 ("Alltel"), applied for Eligible Telecommunication Carrier ("ETC") status on May 19,
5 2003. Docket No. T-03887A-03-0316. Alltel's application includes Section 11.⁸ Exhibit
6 R-19 (Application of Alltel).

7 Under Federal law, in order to obtain ETC status, a provider must provide: local
8 usage; voice grade access to the public switched network; dual-tone, multi-frequency
9 ("DTMF") signaling or its functional equivalent; access to emergency services; access to
10 operator services; access to interexchange service; access to directory assistance; and toll-
11 limitation services for qualified low-income consumers. *See* 47 C.F.R. § 54.101(a); *See*
12 *also* A.A.C. R14-2-1307(C). According to the FCC and the Commission, if Alltel's
13 application is approved, the Complainants' area cannot be classified as "unserved" or
14 unable to receive essential telecommunication services. *See* FCC 99-204 at ¶ 86, 64 Fed.
15 Reg. 52738 (1999).

16 Nowhere does the FCC suggest any link between the service status of an area and
17 the existence of a nearby incumbent local exchange carrier or that these services should be
18 provided only by wireline carriers. To the contrary, the FCC has made absolutely clear
19 that the federal Telecommunications Act requires "competitive neutrality." May 1997
20 Report & Order, FCC 97-157 ¶ 47, 62 Fed. Reg. 32862 (1997). The competitive neutrality
21 standard means that universal service support mechanisms must "neither unfairly
22 advantage nor disadvantage one provider over another, and neither unfairly favor nor
23 disfavor one technology over another." *Id.* In establishing this principle, the FCC
24 specifically rejected arguments that a traditional, non-competitive approach could be

25
26 ⁸ If Alltel is granted ETC status, it will have the same carrier of last resort obligations as the wireline providers
discussed above.

1 appropriate in high-cost rural areas. *Id.*, ¶ 50. Rather, the FCC recognizes the validity of
2 other telecommunications technologies, such as wireless and satellite, in providing
3 services to remote areas such as Section 11.

4 The same is true under Commission rules. The Commission's classification of
5 "essential facilities or services" include: Termination of local calls; termination of long
6 distance calls; interconnection with E911 and 911 services; access to numbering
7 resources; dedicated channel network access connections; and unbundled loops. Thus, if
8 Alltel, or another wireless carrier, were providing these services to Section 11, the
9 Complainants would have adequate and essential services. Staff interprets its own rules as
10 such, and at hearing, testified that a wireless service qualifies as "telecommunication
11 service" in the same manner as wireline service. TR 515 (Staff). There is no reason to
12 compel Qwest or any other carrier to provide service to the Complainants. They already
13 have cellular service and Midvale has applied to provide wireline service to them.

14 **II. THERE IS NO EVIDENCE TO SUGGEST THAT QWEST**
15 **DISCRIMINATED AGAINST THE COMPLAINANTS.**

16 **A. Qwest Did Not Intentionally Extend Service into Section 11.**

17 The Complainants argue that they have been discriminated against because others
18 in Section 11 have received Qwest service while they were refused service. The
19 Complainants, however, fail to provide any evidence whatsoever that Qwest discriminated
20 by willfully and knowingly providing service outside its service territory. Rather, all
21 evidence presented in this proceeding indicates that Qwest erred in allowing service to be
22 installed at to 10195 N. Poquito Valley Road and 10150 N. Poquito Valley Road
23 (hereinafter referred to as the "Skipper and Lehman properties" respectively). *See, e.g.*,
24 TR 345-348 (Duffy). Moreover, even if Qwest had knowingly provided service to these
25 two addresses outside of its service territory, Commission rules allow for such an
26 extension. *See* R14-2-502(B); TR 522-24 (Staff). Qwest's only obligation in establishing

1 that service was to notify the Commission. *Id.* Qwest met this obligation as soon as it
2 discovered its error. The Commission, in turn, instructed Qwest not to disconnect to these
3 two addresses. TR 362-63 (Duffy).

4 Qwest complied with the applicable rules for extending service, and was
5 specifically told to continue that service. Therefore, it could not be found, as a matter of
6 law, that Qwest was violating any rule, law or decision enabling this Commission to grant
7 the Complainants' requested relief. *See* TR 522; TR 523-24 (Staff's opinion that the
8 Lehman, Skipper and Hernandez properties are contiguous and therefore are subject to
9 extension under A.A.C. R14-2-502). At hearing, Staff, testifying on behalf of the
10 Commission, stated the following:

11 Q: [S]o I believe what you said is the company isn't discriminating if it is
12 authorized in some form to extend its service to contiguous property,
13 correct?

14 A: I think that is probably correct, that's correct.

15 TR 520 (Staff). For the Commission to find otherwise would be arbitrary and capricious.

16 The Commission itself has no policies, procedures or rules for making a
17 determination as to whether a carrier has "discriminated" or under what circumstances a
18 provider would be in violation of R14-2-502(B). TR 520 (Staff). Commission rules do
19 not provide a definition of "contiguous" in the context of telecommunication providers
20 nor do they provide any guidance with regard to discrimination. Rather, the Commission
21 has made these kinds of determinations on a purely ad hoc basis. It was not until Qwest
22 noticed Staff for a Rule 30(b)(6) deposition to testify on record as to what the
23 Commission policies and procedures were for determining when a provider can be forced
24 to serve outside of its service boundaries that Qwest was able to find out what standards
25 are being applied by the Commission. According to Staff, this entire complaint turns on
26 the definition of "contiguous". *See* Exhibit A (an exchange between Qwest and Staff at

1 hearing regarding its policies and procedures, or lack thereof, in making determinations of
2 discrimination). As a result, there is simply no way for a carrier, such as Qwest, to know
3 what it is and is not supposed to do.

4 In cases similar to this, Qwest has consistently maintained that it does not have an
5 obligation to provide service outside of its service area. The Commission also has
6 consistently held that Qwest is not required to serve individuals outside its service area
7 even when, as here, mistakes were made that resulted in other individuals receiving
8 service outside of Qwest's territory. See, e.g., *Bruce Walker v. U S WEST*
9 *Communications, Inc.*, Docket No. E-1051B—96-543, Decision No. 60175; *Don B. Miller*
10 *and Moira L. Miller v. U S WEST Communications, Inc.*, Docket No. E-1051B-97-130,
11 *Bryan & Pam Dellinger v. Qwest Corporation*, Docket No. T-01051B-01-0354, Decision
12 No. 64828. Staff confirmed that the Commission has never required Qwest or any other
13 provider to involuntarily extend services to customers outside of its service area. TR 538.

14 Other than the two mistakes made in providing service to two addresses in Section
15 11, it is clear that in this proceeding Qwest consistently refused to provide service to the
16 Complainants because they were outside of Qwest's service territory. See, e.g., TR 75:23-
17 76:1; 91:24-92:2; 168:13-16; 214:9-215:3; 221:4-7. Qwest's mistaken extension of service
18 does not provide a basis to extend service to Section 11.

19 Moreover, Qwest is presented with a "Catch-22" situation. On the one hand,
20 Qwest notified the Commission of its inadvertent service to these two addresses. In turn,
21 the Commission instructed Qwest not to disconnect and to continue service indefinitely.
22 On the other hand, the Complainants are now claiming discrimination because these
23 addresses have Qwest service, but they do not. Under these circumstances, a Commission
24 Decision ordering Qwest to serve the Complainants on the basis of discrimination would
25 be arbitrary and capricious.

26

1 **B. The Lehman and Skipper Properties were Installed in Error.**

2 The first mistake involves the Lehman property at 10150 N. Poquito Valley Road.
3 Qwest's records indicate that it installed the Lehman service in May 1999 after the
4 Lehmans gave Qwest's service representative a neighbor's address at 9750 N. Poquito
5 Valley Road. TR 345-46; 481 (Duffy). Qwest's records do not indicate that the Lehmans
6 provided any additional information, such as Section, Range and Township, when they
7 ordered their service. As made clear at hearing, there was in 1999, and still is to a large
8 degree, no existing address or streets mapped or provided to individuals moving to
9 Section 11 in Poquito Valley. TR 150 (E. Thompson); 436-37 (Duffy); 486-487 (Dougan).
10 Having been unable apparently to locate the Lehman property in Qwest's address system,
11 the customer service representative took the 9750 address information and assumed that
12 the address just above it was within Qwest's service territory.⁹ TR 345-47 (Duffy).
13 Qwest's service area ends at 10000 N. Poquito Valley Road (the point at which Section
14 14, which is inside Qwest's service area, ends and Section 11 begins).

15 Qwest believes that the service representative then went out of process and
16 unilaterally extended the service boundaries in Qwest's addressing system to a point
17 beyond the 10000 N. Poquito Valley Road mark. TR 346. The order was then processed
18 as any other order. Since there were Qwest facilities in the area and no reason to call an
19 engineer to either verify the location or extend facilities to reach the property, the
20 installation was done without any indication that the property was not inside Qwest's
21 serving territory. *Id.*; TR 480.

22 The second mistake occurred at the Skipper property at 10195 N. Poquito Valley
23 Road and is directly related to the Lehman installation.¹⁰ In October of 1999, the first line

24 ⁹ The process that is supposed to be followed, and based on Qwest's records, is followed virtually 100 percent of the
25 time, is that the service representative should have requested that the Lehmans provide Range, Section and Township
26 and Section information so that the property could properly be identified is inside or outside of Qwest's service
 territory. TR 346 (Duffy).

¹⁰ It is clear from Qwest records and from the Complainants' testimony that service was installed and is being billed

1 was installed in error. TR 340 (Duffy). A second line was installed in early December
2 1999 at the same address. *Id.* In reviewing the records and talking to the Qwest
3 employees who actually performed the installations, there was nothing remarkable about
4 these orders. TR 358-59 (Duffy). These orders were simply processed as any other order.
5 *Id.* Based on this information, Qwest determined that the boundary line must have been
6 extended in error at the time of the Lehman installation. TR 348 (Duffy). Thus, when the
7 Skippers called to order service (or anyone else who may have called with a Poquito
8 Valley Road between May 1999 and January 2000), Qwest's internal mapping system
9 showed that they were inside Qwest's service territory. TR 348; 355 (Duffy). Again, no
10 engineer was called to validate that the property was within Qwest's territory or to install
11 necessary facilities to service that property. TR 480 (Dogan).

12 The Complainants attempt to argue that these individuals who received Qwest
13 service in error gained advantage or were treated differently by Qwest for some reason.
14 See, e.g. TR 25 ("prominent" citizens); TR 177. However, the Qwest engineer
15 responsible for policing the boundary lines testified that: (1) he did not and was unaware
16 of anyone else who had given them special treatment; (2) none of these customers were
17 ever employed by Qwest as contractors or otherwise; (3) neither he nor any other Qwest
18 engineer was called out for these orders; and (4) he specifically told Mr. Lehman, in
19 person, that he was outside of Qwest's service territory and would not be able to get
20 service. TR 480; 490 (Dogan). In investigating these complaints, Qwest interviewed
21 the individuals who installed the Lehman and Skipper services. TR 358-59 (Duffy). All
22 indicated that they did not know that they were providing service to these addresses in
23 error but were simply following orders as they do for any installation. *Id.* Even Mr.
24 Thompson testified that as an installer for the company with 29 years of experience, he

25 to one address even though two homes are receiving the service. TR 105 (S. Thompson). As a result, Qwest has
26 always treated the two parcels as one for ordering and billing purposes. TR 363 (Duffy). Qwest has continued to
provide service to this address through transfer of responsibility orders as instructed by Staff.

1 did not concern himself with whether or not a particular order for installation was at a
2 location within Qwest's service boundaries, particularly if there were available facilities
3 and no other indication that the area might be outside Qwest's boundaries. TR 149
4 (Thompson). The job of determining whether a potential customer was in or out of
5 territory falls on the service representative or the field engineer. TR 478 (Dogan); 429
6 (R. Cross). Mr. Thompson, like the individuals who installed the Lehman and Skipper
7 services, did their job, nothing more and nothing less.

8 These errors were not discovered until late 1999 to early 2000, when Section 11
9 began receiving a lot of attention. This is due partly to the events involving the Moxley
10 property, where Mr. Thompson broke into the pedestal near his property and re-wired
11 service to his and the Dentons' property, and the fact that the Thompsons had filed an
12 informal complaint against Qwest for service, prompting an internal investigation into
13 Section 11 activities. TR 348 (Duffy); 487 (Dogan). It was during this time that Qwest
14 discovered it was serving properties outside of territory in Section 11. TR 348 (Duffy). At
15 that juncture, Qwest contacted the Commission and notified it of the error. TR 362-63
16 (Duffy). The Commission told Qwest not to disconnect the Skipper and Lehman services.
17 *Id.* After discovering its mistake, Qwest repaired its mapping system in January 2000
18 with the proper boundaries on Poquito Valley Road and added new streets, such as
19 Esteem Way, to more clearly indicate that all properties in Section 11 were not inside
20 Qwest's territory. TR 348-51 (Duffy); Exhibit R-13. After the boundary was clarified,
21 anyone calling Qwest for service above 10000 N. Poquito Valley Road would not have
22 been able to receive service.¹¹

23 The Lehman and Skipper situations are exceptions. There is a process that is

24 ¹¹ All of the addresses in Section 11 have not been located. For example, only addresses on Esteem Way known to
25 Qwest at that time, such as Thompsons' address, could have been positively identified as outside of Qwest's service
26 territory. TR 350. Other addresses on Esteem Way and other streets, like Stardust Lane, may still be hard for Qwest
to identify. Even the U.S. Post Office is unable to deliver mail to these new addresses and streets. TR 150 (E.
Thompson).

1 followed in situations where a customer calls with an address that is not on Qwest's
2 Premis system or, as was the case with the Thompsons and Dentons, where a customer
3 does not yet have an address to provide. In these instances, the sales representative is
4 supposed to ask for the Range, Township and Section number. TR 340-44 (Duffy); 424-
5 26 (Cross). If the customer cannot provide this information, the order is either placed into
6 the system for further investigation or the customer calls back with the information.
7 Depending on what information the sales representative is able to get and what
8 information the Premis system can provide, the customer may be told immediately that
9 they are outside Qwest's service territory. Qwest, however, will error on the side of the
10 customer and relies largely, if not exclusively, on the information that the customer
11 provides. TR 344 (Duffy).

12 If an address is unavailable or the location unclear, the sales representative will
13 issue an order number for tracking purposes, and the order is sent to Qwest's held-order
14 department or the field engineering office for verification. TR 424-26 (Cross). The
15 service order is also distributed to other departments within Qwest as a matter of course,
16 and a letter is sent to the customer confirming the order and the installation date. TR 404
17 (Duffy).

18 **C. The Denton and White Orders.**

19 There is confusing testimony from the Dentons and Mr. White regarding their
20 service orders. It appears, however, from their testimony that the process above was
21 followed. When service was actually ordered for the first time by the Dentons, in August
22 2000, Qwest asked Mrs. Denton for the legal description of her property because no
23 address had been assigned, and the Dentons' street, Esteem Way, had not been recorded
24 on any map. Because she did not have it on-hand, she had to call Qwest back with the
25 information. This call was made after the Dentons decided to place their home in Section
26 11. See TR 208-210 (Tracy Denton). Shortly thereafter, the Dentons received a call

1 informing them that they were not in Qwest's service territory and would not be able to
2 get service in Section 11. TR 210-212 (Tracy Denton). Prior to this order, Mrs. Denton
3 testified that she had called to inquire whether it provided service to their property, which
4 they had bought months earlier, even though their closing documents made clear that they
5 would not have telephone service. TR 208 (Tracy Denton). Mrs. Denton testified that, at
6 the time, she could only provide a "parcel" number to identify the location of her
7 property. *Id.* Qwest, however, cannot locate property over the phone by a parcel number.
8 TR 496 (Dougan). At this time, the Dentons did not yet have an address or a Range,
9 Township and Section number. TR 209 (Tracy Denton). Qwest told Mrs. Denton to call
10 back with more specific information when she had it and was ready to order service. *Id.*
11 As demonstrated in the documents provided by the Thompsons' realtor, Qwest serves
12 portions of "Poquito Valley". TR 48-49 (S. Thompson). Section 11 is part of Poquito
13 Valley. *Id.* Section 14 is also part of "Poquito Valley" but is within Qwest's service
14 territory. If, for example, during this initial call Mrs. Denton asked whether Qwest served
15 "Poquito Valley" in Arizona, without more specific information she might have received
16 an affirmative answer.¹²

17 Similar to the Dentons, Mr. White's July 2000 closing documents made clear that
18 no telephone service was available at his property in Section 11. TR 163, 177 (T. White);
19 Exhibit R-6 (Seller's Property Disclosure). When he first called to Qwest to inquire about
20 service in August or September 2000, his property and street, which was originally listed
21 on Esteem Way, was not in Qwest's computer system at all.¹³ TR 156 (T. White).

22 ¹² Neither Qwest nor the Dentons have any notes or records relating to this alleged conversation.

23 ¹³ Mr. White also testified that he was told to change his address from Esteem Way to North Poquito Valley Road.
24 TR 165 (T. White). A Qwest employee named by Mr. White as party to these conversations, however, testified that
25 Qwest would never request that a customer change his address. TR 423-24 (Cross). Poquito Valley Road, part of
26 which is inside Qwest's service territory, is inside Qwest's service territory. During the time Mr. White called
regarding his property on Esteem Way, Esteem Way did not exist on Qwest's map or any other map. TR 156 (T.
White); 343 (Duffy). Therefore, it is entirely conceivable that, consistent with Qwest's policies and practices,
Qwest's sales or held order representative, asked Mr. White about the nearest street, Poquito Valley Road, and was
told that street was on Qwest's address system and inside Qwest's service territory.

1 According to Mr. White, Qwest asked him whether any of his neighbors had service to
2 which he responded in the affirmative. TR 162 (T. White). Apparently, there was
3 additional discussion about the utility box that housed Arizona Public Service electric
4 equipment, the general idea being that if there was a utility cross box of some sort was
5 visible to eye then there probably would be Qwest service at that cross box.¹⁴ TR 164-65
6 (T. White). Based on this information, Mr. White was told that he probably would not
7 have a problem ordering Qwest telephone service. *Id.*

8 It appears that Mr. White actually ordered service from Qwest for the first time in
9 December 2000. TR 165 (T. White). It is unclear whether he gave Qwest his Range,
10 Township and Section number, an address on Esteem Way, or the phone numbers and
11 names of his neighbors (presumably the Lehmans and Skippers) during this phone call.
12 TR 156; 170 (T. White). Mr. White, however, was apparently given an installation date of
13 January 24, 2001 on which date a Qwest truck drove to his house then drove away. TR
14 166 (T. White). Although Qwest has no records of any service orders or held-orders
15 under his name, Mr. White testified that he was given a number of installation dates and a
16 number of service orders.¹⁵ TR 157 (T. White). He also testified that he spoke to Qwest
17 employee Rick Cross, who was working in Qwest's held-order department (or "CCE") at
18 the time. *Id.*

19 Depending on exactly what was said during this conversation, it is entirely
20 conceivable that a Qwest sales representative received conflicting information about the
21 Section, Range and Township and a street that did not exist in Qwest's system but had
22 Qwest phone numbers for neighbors in the same Range, Township and Section number
23 and, therefore, attempted to process the order. Pursuant to Qwest's policies and

24 ¹⁴ This cross box or pedestal is most like the one that sits at the corner of Sections 11 and 14, which is wired to
25 provide service to residents of Section 14. TR 482 (Dogan).

26 ¹⁵ New service order records are not always available if the order is not filled, like it was in this case. However,
Qwest is generally able to find what it terms "RTT" tickets for orders like this where the location is unclear. TR 368-
69 (Duffy).

1 procedures, this order would have then ended up in Qwest's held-orders department so
2 that somebody, in this case Rick Cross, could figure out what was going on in an attempt
3 to get service to this home. TR 424-26 (Cross). It is situations such as this that punctuate
4 the problems that can result when service is extended outside of Qwest's territory on a
5 piecemeal basis.

6 **D. The Hernandez Service is Inside Qwest's Service Territory.**

7 At hearing, Qwest distinguished the Hernandez property from the Skipper and
8 Lehman properties because the Hernandez service terminates within Qwest's service
9 territory.¹⁶ TR 339; 365 (Duffy). The Complainants confirmed this fact. *See* Exhibit C-6.
10 Thus, the Hernandez property is not a property being served outside of Qwest's service
11 territory.

12 Qwest also distinguished the actual installation of the Hernandez service from the
13 installation that was done by Mr. Thompson with respect to the Moxley residence. Mr.
14 Thompson broke into Qwest's property (the pedestal) and re-wired the lines so that he and
15 the Dentons could have service. TR 142 (E. Thompson). He did this without Qwest's
16 approval or supervision and after he had retired from the company. TR 143; 152 (E.
17 Thompson). Whether or not a person named "Jason" spoke to Mrs. Thompson or Mrs.
18 Denton regarding the Moxley installation is irrelevant.¹⁷ Mr. Thompson's actions were
19 illegal. He was a 29-year employee of the company and did installations and repairs
20 during that entire time. TR 132 (E. Thompson). In other words, he knew what he was
21 doing and did not need someone in Qwest's sales office to tell him how or what he could

22 _____
23 ¹⁶ The Hernandez's own two adjacent parcels of property. One is within Qwest's service area, Section 14, and one is
24 in Section 11 and borders Qwest's service territory. Qwest service terminates at the Hernandez property within
25 Section 14.

26 ¹⁷ Qwest records indicate that Mrs. Denton called Qwest to order service at the Moxley address. There is no
indication that Mrs. Thompson called regarding the Moxley property. TR 379-80 (Duffy); Exhibit R-16. In addition,
Mrs. Thompson also testified that Mr. Thompson made all of the calls to Qwest regarding service because he had to
in order for them to receive the service concessions that are part of the company's retirement plan. TR 62; 120 (S.
Thompson). Thus, her calling "Jason" is not consistent with her the testimony and should be regarded as such.

1 install. In fact, even Mr. Thompson testified that "Jason", the service representative who
2 allegedly took the order for service at the Moxley address, had no idea that Thompson was
3 the end user and that he resided at a different address. TR 136 (E. Thompson).
4 Therefore, it would have been impossible for "Jason" to opine as to whether Mr.
5 Thompson's plan was something Qwest would approve. Mr. Thompson also testified that
6 during the alleged "Jason" conversation, he was told "if we could get service in territory,
7 then we could run it anywhere after that." TR 66 (S. Thompson). This kind of
8 information would be consistent with the way the Hernandez installation was completed,
9 not with what Mr. Thompson did at the Moxley property. No one at Qwest would have
10 said: "if you can break into Qwest's pedestal, you can run service anywhere you would
11 like." All the Thompsons wanted was service, and they did not care how they got it. See,
12 e.g. TR 54 , 75-76; 116 (S. Thompson).

13 **E. Qwest did not Discriminate Against the Thompsons.**

14 The Thompsons also claim that the Hernandez installation provides a basis for a
15 funding of discrimination. TR 91 (S. Thompson). In doing so, they compare apples and
16 oranges. The Hernandez installation was done inside Qwest's territory on property owned
17 by the Hernandez family. TR 363-64 (Duffy); Exhibit C-6. Mr. Thompson even testified
18 that these installations were common during his employment with the company. TR 144
19 (E. Thompson). The Thompsons, however, were using property owned by another
20 individual and managed to obtain service by breaking into Qwest's pedestal and re-wiring
21 its lines. TR 142 (E. Thompson). To claim that Qwest's disconnection and removal of
22 Mr. Thompson's rigged service that originated from his neighbors house amounts to
23 discrimination is wholly without merit.

24 At hearing, the Thompsons also claimed that Mr. Thompson was discriminated
25 because he was an employee of the company. TR 98-99 (E. Thompson). Specifically, the
26 Thompsons claim that he was treated differently and in jeopardy of losing his job because,

1 as a Qwest employee, he filed an informal complaint against the company while working
2 in the Prescott area. TR 58 (S. Thompson). For example, Mr. Thompson heard through
3 the "grapevine" that a friend who was at a party overheard others talking about the
4 company not being happy with Mr. Thompson and that his job may be in jeopardy. TR 57
5 (S. Thompson); 103 (E. Thompson). Not only is this third-hand information inadmissible
6 as hearsay, it is internally inconsistent and was not supported by any of the testimony at
7 hearing. Mr. Thompson himself testified that he never had any problems in his 29 years
8 at Qwest, that he knew all of the employees in the Prescott area, and that they were all
9 "good friends." TR 102-03 (E. Thompson). Another former Qwest employee who worked
10 with Mr. Thompson during his tenure in the Prescott area testified that he never heard of
11 anyone threatening to fire Mr. Thompson or having a "vendetta" against him. TR 494;
12 496 (Dogan). In fact, Qwest records indicate that Qwest went an extra step for Mr.
13 Thompson in trying to find a way to provide him with service even when he told them that
14 he was outside of Qwest's service territory when he placed his order. TR 390; 368
15 (Duffy); Exhibit R-14 (Thompson's RTT ticket). Mr. Thompson also testified that, as a
16 union employee at the company, he was once a union steward and that he would not have
17 hesitated to call on the union and initiate a report had he felt that he job was in jeopardy as
18 a result of filing a complaint against the company. TR 137 (E. Thompson). None of the
19 Thompsons' allegations, legally or factually, can form the basis for discrimination.

20 **III. FORCING QWEST TO SERVE IN SECTION 11 IS NOT IN THE PUBLIC**
21 **INTEREST.**

22 Where a request for initial service is at issue, the Commission must consider the
23 best interest of the public. *James P. Paul*, 137 Ariz. at 430, 671 P.2d at 408. Where a
24 carrier has applied to serve an area, and that carrier can provide service that is adequate
25 and reasonably priced, it is in the public interest that the carrier be granted a certificate for
26 the area.

1 A. The Commission Should Grant Midvale's Request to Serve the
2 Complainants Section and Two Other Sections in Prescott Valley.

3 On January 10, 2002 Midvale applied to extend its service territory to include parts
4 of Poquito Valley in Prescott Valley, Arizona, including Section 11, and two other
5 Sections directly north in the Antelope Meadows area.¹⁸ See Docket No. T-032A-03-
6 0017; TR 240. Staff has recommended that the Commission approve Midvale's
7 application. See Staff's Aug. 1, 2003 Report and Recommendation. If Midvale's
8 application is approved, it will be the incumbent local exchange carrier ("ILEC") for the
9 Complainants, Section 11, and two other sections, and the Complainants' request for
10 service from Qwest will be rendered moot. See, e.g., Decision No. 64828, *Bryan and Pam*
11 *Dellinger v. Qwest Corporation*, Docket No. T-01051B-01-0354, at 5-7.

12 Midvale anticipates that this particular expansion would provide wireline
13 telecommunication services, including DSL capability, to approximately 300 parcels and
14 100 potential customers, the majority of which are located in Section 11. TR 237; 240 (K.
15 Williams). Midvale testified, however, that if Qwest were ordered to serve even part of
16 Section 11 it would "drastically" change Midvale's ability to expand into this area, thus,
17 eliminating the possibility for wireline service to at least 100 individuals in the area. TR
18 271 (K. Williams). This elimination of potential wireline service for the remainder of
19 Poquito Valley and Antelope Meadows is not in the public interest and is contrary to
20 fostering competition in Arizona.

21 With regard to the Complainants specifically, Midvale's cost of providing service
22 is also significantly lower than Qwest's cost to provide service. First, Midvale anticipates
23 that it will apply for Federal funding to help build the necessary facilities in the area. TR
24 243 (K. Williams). As a result, the Complainants, and anyone else ordering service in the
25 area, would not have to pay any up-front construction costs. *Id.* Qwest engineering

26 ¹⁸ In this application, Midvale also applied for a certificate to serve three Sections in the Long Meadow and Crossroad Ranch areas near Prescott. TR 240 (K. Williams on behalf of Midvale).

1 estimates, by comparison, would require the Complainants to pay approximately \$4,100 in
2 construction costs alone, a calculation that Staff found reasonable. See Staff's July 9,
3 2003 Report; TR 332-33 (Duffy). Although the rate for basic local service is higher for
4 Qwest on a monthly basis, it would take the Complainants almost 30 years to recoup the
5 difference between the higher monthly rate from Midvale and the up-front construction
6 costs from Qwest. *Id.*

7 The Complainants have no problem with Midvale as their wireline provider. See
8 e.g., TR 121 (S. Thompson); 172, 175 (T. White). They just do not want to wait longer
9 for Midvale to install its facilities. TR 175 (T. White). Not only does the potential wait
10 fail to form a basis for forcing Qwest to serve them, it would result in at least 97 other
11 potential customers missing out on any opportunity to obtain wireline service for their
12 homes. While Complainants may believe that this is in *their* interest, it is not in the
13 *public* interest.

14 **B. Forcing Qwest to Serve Section 11 Would Divert Facilities Engineered**
15 **for Anticipated Growth in Sections that are Currently Within Qwest's**
Boundaries.

16 In forcing Qwest to serve the Complainants or Section 11, the Commission is
17 setting Qwest up to fail. If Qwest is required to redirect resources from areas within its
18 current boundary to areas outside of its boundary, the individuals living *within* Qwest's
19 service territory who want service also lose. Qwest has worked hard to uphold its bargain
20 with the Commission under the Service Quality Tariff. The Complainants are simply not
21 part of that bargain. As Qwest made clear at hearing and throughout this proceeding,
22 some facilities are in place near the Complainants property. TR 482 (Dogan). The
23 Complainants live on the border of Qwest's service territory between Section 11 and
24 Section 14. When Qwest placed facilities in this area, it engineered them specifically for
25 Section 14 to accommodate current customers and anticipated growth of additional
26 customers. *Id.*

1 As part of its obligation under the Service Quality Price Cap Tariff, among other
2 obligations, Qwest must engineer facilities to accommodate growth so that new service
3 can be installed within the times frames required under the Tariff. TR 312-13 (Duffy). If
4 Qwest is unable to get service up and running within five days, it must begin crediting
5 customers and may be subject to fines assessed by the Commission. No other provider in
6 Arizona pays penalties for violations of a Service Quality Tariff. Qwest's improved
7 placing and service into its service area has resulted in no penalties being assessed against
8 it in 2002 and for the first half of 2003. TR 314 (Duffy). Diverting resources to serve
9 Section 11 that are placed to serve Section 14 disadvantages both Qwest and its future
10 customers in Section 14.

11 C. **It is in the Public Interest to Resolve Issues Regarding Unserved and**
12 **Underserved Areas on a Uniform, Industry-wide Basis.**

13 The issues raised by these complaints are complex and implicate a much broader
14 inquiry including "how best to address unserved areas that result from population
15 growth...." See Staff's Reply Comments to Qwest's Consolidated Answer at 4 (10/18/02).
16 Qwest agrees. In November of 2002, Qwest moved this Commission to join these other
17 carriers in these proceedings to enable the Commission to make the specific factual and
18 legal determination as to "which common carriers are best able to provide such services
19 for that Unserved community" necessary in exercising its authority to force Qwest to
20 serve outside its service area. See 47 U.S. C. § 214(e)(3). Alternatively, pursuant to
21 A.A.C. R14-3-109(H), Qwest asked for consolidation of matter with Docket No. RT-
22 00000H-97-137, the Arizona Universal Service Fund ("AUSF") Docket.

23 Consolidation of these proceedings would enable the Commission to resolve
24 broader policy issues relevant to the complaints as well as the AUSF Docket, such as
25 establishing whether Arizona has a specific, predictable and sufficient funding mechanism
26 for telecommunication service to rural areas, and how to address unserved areas that result

1 from population growth beyond carriers' service boundaries. Most importantly, it would
2 ensure that all such complaints are resolved in a manner consistent with other similar
3 complaints of remote rural areas and are consistent with federal law.

4 Twice this Commission has opened AUSF rulemaking dockets to develop rules,
5 policies and procedures for dealing with unserved and underserved areas. This docket has
6 been essentially open since 1997. On September 21, 2001, the Commission re-opened
7 that docket. Both actions were a result of specific complaints or cases whereby the
8 Commission had faced funding issues for rural areas and was forced to make a decision
9 on how to apply the Fund on an ad hoc basis. TR 527-528 (Staff). The September 2001
10 notice requested stakeholders comment on various issues relating to unserved and
11 underserved areas. The majority of major providers, including wireless providers, filed
12 comments. TR 529 (Staff). Nonetheless, the Commission has no current timeline for
13 closing the docket and resolving some of the issues punctuated by these complaints. TR
14 530 (Staff). As a result, Qwest and other carriers who may be now or in the future
15 similarly situated have no rules to follow in making determinations relevant to service in
16 unserved and underserved areas.

17 Similarly, the Commission has opened a docket relating to Extended Area Service
18 ("EAS"), Docket No. RT 00000J-02-0251. The purpose of this docket is to formulate
19 rules for enabling carriers to uniformly establish processes by which they can offer toll
20 calls to customers on an affordable basis. Likewise, the Commission has no plans for
21 filing or promulgating these rules. Thus, each carrier is left on its own to make such
22 determinations, and customers are left with having to pay for calls that are made across
23 the street but not necessarily across the rest of the state.

24 **IV. CONCLUSION**

25 While Qwest recognizes the frustration felt by the Complainants who cannot obtain
26 wireline telephone service as quickly as they could like, Qwest consistently and uniformly

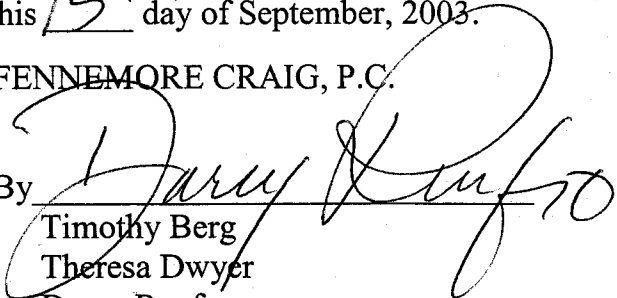
1 has upheld its policy to provide service to only those individuals and business entities
2 within its designated service territory. Qwest also understands the frustration felt by the
3 Complainants over errors that occurred when they allegedly misunderstood that service
4 would be available to them. This was human error. While it is frustrating for the
5 Complainants, the reality is that Qwest does order intake for over 13 million customers
6 and potential customers each year. The mistakes made in by Qwest in Section 11 are an
7 infinitesimal percentage of the total amount of orders taken by Qwest. This is true even if
8 you consider the three other similar instances put before the Commission since 1995 (i.e.
9 the *Miller*, *Walker* and *Dellinger* complaints). Even understanding some of the
10 Complainants' frustration, they do not introduce any evidence demonstrating that Qwest
11 discriminated against them by refusing to extend service.

12 The Complainants have a cellular alternative available to them now and will have a
13 wireline provider in the near future – a provider that the Complainants testified they
14 would have no problem using. In this world of competitive telecommunications, the FCC,
15 Congress and the Commission have created a process intended to attract carriers to serve
16 people, like the Complainants. In this case, that process worked, and Midvale, with its
17 own state-of-the-art facilities, is willing to provide service to this area.

18 RESPECTFULLY SUBMITTED this 15th day of September, 2003.

19 FENNEMORE CRAIG, P.C.

20
21 By


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EXHIBIT "A"

QWEST EXAMINATION OF DEL SMITH ON BEHALF OF THE
COMMISSION
July 15, 2003

Q. The Commission also, if I recall your testimony correctly from your deposition, has no rules or policies or procedures concerning the treatment, how the Commission would review claims of customer treatment in a discriminatory manner, correct?

A. That's correct.

Q. I remember us talk – well, I wasn't actually at your deposition. I remember reading in your deposition about Staff's view or what it would consider particularly if somebody made a claim that they were being discriminated against, that some people were being given service in the area and other people were not, correct?

A. I recall a specific discussion about that.

ALJ DION: Mr. Smith, do you mind speaking into the microphone? You said you did recall a discussion?

THE WITNESS: I recall there was some discussion about that, right.

BY MS. DWYER:

Q. That's where we talked about there was no rules or policies or procedures in place for Staff to make a determination about that, correct?

A. That's correct.

Q. I am putting up here what has been marked and admitted I believe as Exhibit C-6, which is a map of the complainants' service areas. And I am doing that to help illustrate some of my questions maybe to you.

When we talked or when you talked about what you would look at, you said that you would look at certain factors like whether the company had extended, for example, to others in the area because the property was contiguous, for example?

Is that a yes?

A. Yes.

Q. Okay. And, in fact, we talked about a Commission rule in place that addresses a company, a telecommunications company, extending to out of its service area to contiguous property, did we not?

A. Yes, we did.

Q. And that rule is Commission Rule R-14-2502, correct?

A. I will accept that.

Q. The rule is of record and I really don't want to make another exhibit and add to the pile of exhibits, but would it be –

A. I know what you are talking about, if that's – that is the rule that you are supposed to notify the Commission if you are serving a contiguous property.

Q. Okay. I am not going to make it an exhibit but I am going to place it in front of you just for ease of reference.

A. I think the issue is what the definition of continuous.

Q. Right. So I believe what you said is the company isn't discriminating if it is authorized in some form to extend its service to contiguous property, correct?

A. I think that is probably correct, that's correct.

Q. The rule in fact simply requires a company to notify the Commission when it does go outside service boundary lines to do that, correct?

A. Yes, that's correct. I guess I – just to be, just to clarify, once again, I think the issue is how you define contiguous. And I am thinking in terms of my definition of what contiguous means.

Q. Right. And you talked about your definition of contiguous. And you said contiguous means adjacent to the utility service area, the property is butted up against the service boundary, correct?

A. That's correct.

- Q. And that a utility could make an extension out of its certificated area to a contiguous piece of property per your definition and be in compliance with the rules, correct?
- A. If it notified the Commission, that's correct.
- Q. And if the Commission, again the rule requires notification, but if the Commission saw something inappropriate going on, once it was noticed it would have the ability to take action if it wanted?
- A. That's correct.
- Q. In looking at C-6, there is a black line that runs across it horizontally that represents Qwest's service boundary. Do you see that?
- A. Yes, I do.
- Q. Okay. Would this red block representing the Lehman property be contiguous, by your definition, to the service boundary area?
- A. Yes, I think so.
- Q. Would this red block of property, if at one time it was one piece of property, which is labeled Skipper/Dunn – Do you see that?
- A. Yes.
- Q. --would that be contiguous?
- A. There is this black line.
- Q. If it was. It is a hypothetical on my part, if at one time.
- A. It if were all –
- Q. -- one piece.
- A. Yes.
- Q. Yes, it would. Would this piece of property be contiguous?
- A. Yes, it would.

Q. Okay.

ALJ DION: Just for the record, that was the Hernandez property?

MS. DWYER: Yes, it was. I am sorry.

BY MS. DWYER:

Q. I also believe you said that just because a utility may choose to extend pursuant to this rule, or it may not even choose to do it, it may happen by mistake that that does not necessarily change its boundary lines, correct?

A. Would you say that again, please.

Q. Yes. Maybe it helps if I point and maybe it doesn't. In your deposition, I believe you testified that if a utility, either intentionally or even unintentionally, by mistake, extends to a contiguous property, notifies the Commission, that does not necessarily change the boundary line, is that correct?

A. That's correct.

Q. Because you would have a -- it doesn't make these properties then contiguous, is that correct?

A. That's correct.

Q. The company is not obligated to then extend its service boundary line upward, correct?

A. That's correct.

Q. Because you could in effect have a problem ad infinitum, moving the boundary line up forever, correct?

A. That's correct.

(Transcripts pages 520:2-525:8)

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